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No. 91-48

# In the Supreme Court of the United States

OCTOBER TERM, 1991

AFIA/CIGNA WORLDWIDE, ET AL., PETITIONERS

*v.*

MARILYN C. FELKNER, ETC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether Section 21(b) of the Longshore and Harbor Workers' Compensation Act, providing for administrative review by the Benefits Review Board of workers' compensation decisions, applies to claims arising under the Defense Base Act.

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### OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A13, is reported at 930 F.2d 1111. The order of the district court, Pet. App. C1-C2, is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on May 10, 1991. The petition for a writ of certiorari was filed on July 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The present dispute concerns the extent to which the Defense Base Act (DBA), 42 U.S.C. 1651-1654, incorporates the amended appellate review procedures of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* Congress enacted the DBA in 1941 to provide workers' compensation coverage for employees of government contractors at overseas military bases, and shortly thereafter broadened coverage to all employees of American contractors engaged in foreign projects related to the national defense, regardless of whether they were employed on military bases. See generally *University of Rochester* v. *Hartman*, 618 F.2d 170, 172, 173 & n.1 (2d Cir. 1980).[1] Rather than drafting a new workers' compensation scheme, Congress generally extended the already established LHWCA provisions to the newly covered workers. Accordingly, Section 1(a) of the DBA provides that the provisions of the LHWCA shall apply to DBA-covered workers "[e]xcept as * * * modified" by the DBA itself. 42 U.S.C. 1651(a).

The DBA thus incorporates the claim-processing procedures of the LHWCA with only minor modifications. Before its amendment in 1972, Section 19 of the LHWCA authorized deputy commissioners in the Department of Labor's Office of Workers' Compensation Programs (OWCP) to investigate claims for benefits under the Act, to hold formal evidentiary

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[1] In addition, Congress eventually expanded DBA coverage to protect employees fulfilling service contracts tied to an overseas governmental construction project or to a national defense activity. *University of Rochester*, 618 F.2d at 173 & n.1. The coverage provisions of the Act are set forth at Section 1(a)(1)-(6), 42 U.S.C. 1651(a)(1)-(6).

hearings where necessary, and to issue decisions on the claims. 33 U.S.C. 919 (1970); Pet. App. A4. Under Section 21 of the pre-1972 LHWCA, any party seeking review of a compensation order issued by the deputy commissioner could do so by filing an injunction action in the federal district court for the judicial district in which the employee's injury occurred. 33 U.S.C. 921(b) (1970); Pet. App. A6.

The sole modification to the LHWCA procedures is found in Section 3(b) of the DBA, 42 U.S.C. 1653(b), pertaining to judicial review of compensation orders. At the time of the DBA's enactment, the LHWCA provided for judicial review in the judicial district where the injury occurred. Since claims under the DBA typically arise outside of a judicial district of the United States, Pet. App. A6, Congress specified in Section 3(b) of the DBA that "[j]udicial proceedings provided under section[] * * * 21 of the [LHWCA]" should be instituted in the district court of the judicial district where the office of the deputy commissioner whose compensation order is involved is located.[2]

In 1972, Congress amended the Longshore Act by, among other things, making major revisions in the

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[2] Section 3(b) also provides, alternatively, that if the office of the deputy commissioner who issued the compensation order is not located in a judicial district, judicial review proceedings should be brought in the district court in the judicial district closest to the place of injury. This provision is consistent with Section 3(a) of the DBA, 42 U.S.C. 1653(a), which authorizes the Secretary of Labor to extend compensation districts established under the LHWCA to any area in which the DBA applies. Because the Secretary never established an office for an extended DBA compensation district outside a judicial district of the United States, this portion of Section 3(b) has never had practical significance. See 20 C.F.R. 702.101, 704.101; *Pearce* v. *Director, OWCP*, 603 F.2d 763, 766 (9th Cir. 1979).

administrative and judicial procedures for resolving claims. Under Section 19 of the revised Act, Congress transferred responsibility for conducting hearings on claims from deputy commissioners to administrative law judges, although the deputy commissioners otherwise retained their investigative and administrative authority. See 33 U.S.C. 919. Under Section 21 of the revised Act, Congress provided for administrative review of initial claims determinations: Congress eliminated the provision for district court review and instituted a specialized national administrative tribunal, the Benefits Review Board (BRB), to hear appeals from such decisions. 33 U.S.C. 921(b). Congress also amended Section 21 to provide for judicial review, at the behest of any party aggrieved by an order of the BRB, by petition for review in the court of appeals for the circuit in which the employee's injury occurred. 33 U.S.C. 921(c).

2. Respondent Wanda Sue Frazier worked for petitioner American Express at the Rhein-Main Air Force Base in Germany. Her employment was covered by Section 1(a) of the DBA. Pet. App. A2. After suffering an injury in the course of her employment, respondent Frazier filed a claim for workers' compensation benefits under the LHWCA as incorporated by the DBA. *Ibid.* Petitioner AFIA/Cigna is American Express's insurer for purposes of this claim. *Ibid.* In July 1989, respondent Marilyn Felkner, Deputy Commissioner of the Eighth Compensation District of the Department of Labor, issued a compensation order awarding temporary total disability benefits as of October 13, 1976, the date of Frazier's injury, to December 3, 1980. The order awards permanent total disability benefits thereafter. *Id.* at A2.

Petitioners filed this action in district court to set aside the deputy commissioner's compensation or-

der. Pet. App. A2. Petitioners also filed an appeal with the BRB. *Id.* at A3. Respondent Felkner filed a motion to dismiss the district court action, contending that review of the compensation order lies with the Benefits Review Board under Section 21(b) of the LHWCA, as incorporated by the DBA. The district court agreed and dismissed the action, holding that it did not have jurisdiction pending resolution of petitioners' appeal to the BRB. Pet. App. C1-C2. The district court also concluded that "the proper court for an appeal from any decision of the BRB would appear to be a court of appeals, not a district court. See 33 U.S.C. 921(c); *Pearce* [v. *Director, OWCP*, 603 F.2d 769, 770 (9th Cir. 1979)]." Pet. App. C2.

3. The court of appeals affirmed the dismissal of the district court proceeding, holding that the BRB has sole jurisdiction over petitioners' challenge to the deputy commissioner's order. Pet. App. A1-A13. The court noted that, under Section 1(a) of the DBA, the compensation procedures of the LHWCA govern except insofar as they are modified by the DBA. Pet. App. A4. The court then turned to the "core issue on appeal": "whether the 1972 Amendments to section 21 of the LHWCA, providing for initial review of compensation orders to be administrative with the BRB, apply to initial review of compensation orders under the DBA." Pet. App. A7.

The court ruled that the BRB has exclusive jurisdiction over an initial appeal of a DBA compensation order. It rejected petitioner's argument that Section 3(b) of the DBA authorizes direct review in district court. Emphasizing that Section 3(b) addresses "Judicial proceedings," 42 U.S.C. 1653(b), the court held that the provision modifies only the judicial review procedures of the LHWCA. Pet. App. A8. Because review by the BRB is an administrative pro-

ceeding and not a judicial one, and because the DBA has no provision addressing administrative proceedings, the court concluded that Section 21(b) of the LHWCA, calling for administrative review by the BRB, applies to claims arising under the DBA. Pet. App. A9.

The court further held that requiring review by the BRB does not create any inconsistencies or disrupt the administration of DBA claims. Pet. App. A9. The court noted that its ruling retains parallelism between the DBA and the LHWCA, at least for the administrative stage of proceedings, and that review by the BRB does not interfere with any of the judicial review provisions already in place under the DBA. *Ibid.* Accordingly, it upheld the district court's order that that court lacked jurisdiction and that initial review of a compensation determination is before the BRB.

Although the BRB had not decided petitioners' appeal, Pet. App. A3, the court of appeals also addressed the question of which court—the district court or the court of appeals—would possess jurisdiction over a petition to review any future decision by the BRB. It concluded that Section 3(b) of the DBA requires any judicial review proceeding with respect to DBA compensation orders to be instituted in district court. Pet. App. A11-A12.

## ARGUMENT

1. Petitioners' contention, Pet. 13-17, that there is a conflict among the circuits is based on their failure to distinguish between two distinct issues: (1) whether DBA compensation determinations are subject to BRB review; and (2) in which court are BRB decisions subject to judicial review.

a. No court has accepted petitioners' contention, Pet. 18, that a party may bypass the BRB and secure direct judicial review of an administrative decision on a DBA claim. Petitioners argue (Pet. 14) that the Sixth Circuit, in *Home Indemnity Co.* v. *Stillwell*, 597 F.2d 87, cert. denied, 444 U.S. 869 (1979), "concluded that the proper method to obtain review of a compensation order is in the district court." In fact, *Home Indemnity* concluded that the proper method to review a *BRB* order is in the district court. The linchpin of the court's reasoning was that Section 3(b) is a *judicial* review provision that was unaltered by the 1972 amendments to the LHWCA. The Sixth Circuit did not suggest that the administrative review provisions of the 1972 amendments are inapplicable. 597 F.2d at 90. Indeed, the petitioner in that case had followed the administrative review provisions of the LHWCA by obtaining a Board decision before proceeding to court. Thus, there is no conflict among the circuits on the precise issue presented at this stage of the proceedings.

b. The second issue discussed in the petition is whether the court of appeals or the district court possesses jurisdiction over an appeal from a BRB decision on a Defense Base Act claim. There is a conflict among the circuits on that issue. Compare *Home Indemnity Co.* v. *Stillwell*, 597 F.2d at 88 (6th Cir.) (BRB decisions reviewable in district court), with *Pearce* v. *Director, OWCP*, 603 F.2d 763, 769-771 (9th Cir. 1979) (BRB decisions reviewable in court of appeals). But that conflict does not merit the Court's review at this time. The BRB has not yet issued a decision, and it is purely speculative whether any party to this case will ultimately deem itself sufficiently aggrieved by any such decision to seek judicial review. If a party does seek judicial review of a future BRB order, and the

case does not settle, a party to that proceeding can then seek this Court's review on the question of court jurisdiction to review BRB orders. Thus, even if the issue warranted this Court's review, petitioners seek merely an advisory opinion in the procedural posture of this case. Cf. *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (the Court's "function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the * * * [issue in conflict among the circuits] can await a day when the issue is posed less abstractly").

2. The court of appeals is clearly correct that a party must exhaust its administrative remedy before the BRB prior to seeking judicial review. As the court explained, the DBA incorporates the LHWCA except as modified by the DBA itself. Section 21(b) of the LHWCA sets forth an administrative review procedure, mandating that decisions on claims be appealed to an administrative body, the Board. The only provision in the DBA addressing review of compensation orders is Section 3(b) of that Act, and that provision relates solely to "Judicial proceedings." 42 U.S.C. 1653(b). As the court of appeals held, there is no basis for concluding that this provision overrides the LHWCA's administrative review provisions. Thus, whatever the appropriate interpretation of the interplay between Section 3(b) and the *judicial* review provisions of the LHWCA , it is clear that Section 3(b) of the DBA does not modify the LHWCA's *administrative* review provision, Section 21(b), requiring resort to the BRB before a case is ripe for judicial review.

Congress viewed establishment of the Benefits Review Board, a specialized national administrative tribunal, as an important modification to the

LHWCA's administrative scheme, one that was in line with "the trend in better administered workmen's compensation laws." S. Rep. No. 1125, 92d Cong., 2d Sess. 15 (1972). It is unlikely that Congress intended DBA claims, which are otherwise administratively processed like other LHWCA claims, to be excluded from this significant improvement in the administrative scheme. In the absence of any textual support in the DBA for such an anomalous result, it is not surprising that the courts of appeals have agreed that Section 21(b) of the LHWCA applies to DBA claims.

3. Moreover, the relatively small number of DBA appellate proceedings counsels against review by this Court in the absence of a conflict in the circuits on the question now presented. Claims arising under the Defense Base Act represent a minute percentage of LHWCA-related claims. Of 40,650 lost-time injuries[3] reported to OWCP in fiscal year 1990 under the LHWCA and statutes that incorporate its provisions, only 801 (2%) were injuries occurring in employment covered by the DBA. Furthermore, only a small percentage of lost-time injuries reported result in claims that proceed as far as review by the BRB. For example, while 40,650 LHWCA-based injuries were reported in fiscal year 1990, in the same year approximately 800 LHWCA-based administrative decisions were appealed to the BRB.[4] Thus, assuming

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[3] A lost-time injury is a job-related injury that (1) results in an employee's loss of one or more shifts of work or (2) qualifies for a scheduled award under Sections 8(c)(1)-(20) of the LHWCA, 33 U.S.C. 908(c)(1)-(20).

[4] The number of appellate proceedings under the Nonappropriated Fund Instrumentalities Act (NFIA), 5 U.S.C. 8171-8173, which extends the LHWCA to employees of nonappropriated fund instrumentalities as described in 5 U.S.C. 2105(c), is also

that DBA cases are appealed to the BRB with the same frequency as other LHWCA cases, the jurisdictional issue presented by the petition affects less than 20 cases each year.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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quite small. Approximately 17% of LHWCA-based lost-time injuries (6,945 out of 40,650) reported to OWCP in fiscal year 1990 occurred in employment covered by the NFIA. Of these, only a small minority involve claims based on injuries or deaths occurring outside the United States, which would implicate the NFIA judicial review provision corresponding to Section 3(b) of the DBA. See 5 U.S.C. 8171(d).